



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 72 OF 2015

(ORIGINALLY NAKURU CHIEF MAGISTRATE'S COURT CIVIL CASE NO. 2386 OF 2006)

ZEDEKIAH SISWA OBANDO.....CLAIMANT

V

RIFT VALLEY SPORTS CLUB LTD.....RESPONDENT

JUDGMENT

1. Zedekiah Siswa Obando (Claimant) sued Rift Valley Sports Club Ltd (Respondent) on 14 December 2006 before the Chief Magistrate's Court.
2. The Claimant was asserting that his dismissal was in breach of contract. The Respondent filed a Defence on 26 January 2007.
3. On 9 June 2008, the Claimant filed an Amended Plaintiff contending that he was not afforded an opportunity to be heard and that his dismissal was actuated by malice. The Respondent filed an Amended Defence on 25 June 2008.
4. The suit then proceeded for hearing on 6 July 2010 before the subordinate Court but it was transferred to this Court before conclusion.
5. The Cause was heard afresh on 19 May 2015. The Claimant testified while the Respondent opted not to call any witness.
6. The Claimant's case is that he was employed by the Respondent on 6 April 1983 as a Room Steward. He was later promoted to Dining Room Supervisor.
7. On 9 August 2001 he was summoned to the office and a Secretary called Lilian gave him a letter the same day. It was a letter of summary dismissal, and the reason given was that he had tried to defraud the Respondent of Kshs 2,549/-.
8. The Claimant stated that because he had not been informed of the allegations prior to the dismissal or called before the Respondent's Board, he wrote to the Respondent's Secretary seeking explanations the same day and got a response dated 14 August 2001.
9. On the substance of the allegations, the Claimant stated that his duties did not include handling of cash as the system in place was for members to sign vouchers while the receptionist and cash office dealt with cash.

10. On payments made after the dismissal, the Claimant stated that he was paid earned wages, overtime and accrued leave all totalling Kshs 32,575/30.

11. The Claimant also stated that he was a member of the Kenya Hotels & Allied Workers Union and that the Union had a Collective Bargaining Agreement with the Respondent and that under the Collective Bargaining Agreement, he was entitled to 3 months notice, 3 months house allowance, Christmas bonus and gratuity. He also stated that the dismissal was unlawful.

12. As already mentioned, the Respondent did not call any witness.

13. The Claimant filed his submissions on 7 July 2015 while the Respondent filed its submissions on 24 June 2015.

14. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as, *whether the Collective Bargaining Agreement is applicable to the dispute, whether the dismissal was unlawful/in breach of contract, and appropriate remedies/ entitlements accruing to the Claimant.*

Whether the Collective Bargaining Agreement is applicable

15. The Respondent in its submissions urged that the Collective Bargaining Agreement between it and the Kenya Hotels & Allied Workers Union was not applicable to the instant dispute because the Claimant had not proved he was a member of the Union and also because it commenced after the dismissal of the Claimant.

16. The assertion that the Claimant was not a member of a Union is without merit. The Respondent in its summary dismissal letter copied the same to the Union's Branch Secretary and Shop Steward. It could not have done this just as a matter of course.

17. The Respondent did also not controvert the Claimant's testimony that he was a member of the Union.

18. As to the commencement date of the Collective Bargaining Agreement, clause 27 is clear that the effective date was 1 August 2001. It therefore matters not that it was signed later as the parties mutually agreed to the effective date.

Whether dismissal was unfair

Hearing

19. The primary statutes governing employment in 2001 were the Employment Act, cap. 226 (repealed) and the Trade Disputes Act (repealed).

20. The Employment Act, cap. 226 (repealed) did not grant an employee a right to be afforded an opportunity to be heard before dismissal and therefore the Claimant cannot assert such a right under the Act.

21. Equally, the Trade Disputes Act did not explicitly protect employees against dismissal without a hearing.

22. Binding precedent which set out the legal position at the material time such as Nakuru Civil Appeal No. 27 of 1995, *Rift Valley Textiles Ltd v Edward Onyango Oganda* and Civil Appeal No. 29 of 1985, *Cyrus Nyaga Kabute v Kirinyaga County Council* are also clear that there was no right to a hearing under the common law.

23. The Court must therefore examine whether the Claimant had a contractual right to a hearing before dismissal.

24. The contractual document produced was the Collective Bargaining Agreement between the Kenya Hotels & Allied Workers Union and the Respondent.

25. The Collective Bargaining Agreement did not explicitly provide for an opportunity to be heard before taking disciplinary action but only provided for suspension/interdiction pending investigations in cases of misconduct and warnings.

Lawful/justifiable grounds for dismissal

26. Section 17 of the Employment Act, cap. 226 (repealed) envisaged an employee disputing whether the grounds for dismissal were lawful or justified.

27. The Claimant has contested the lawfulness of his dismissal. The reason given for the dismissal was that the Claimant had attempted to defraud the Club of Kshs 2,549/50.

28. The Claimant's testimony that he was not handling money was not controverted or challenged. He also stated that the members would sign vouchers and make payment to the cash office or reception. This testimony was also not challenged or controverted.

29. The Respondent did not offer any witness. The Court can therefore conclude that the reason given for the summary dismissal of the Claimant was not lawful or justifiable. The dismissal was unlawful and in breach of contract.

30. It was in breach of contract because pursuant to clause 10 of the Collective Bargaining Agreement, the Respondent should have given 3 months notice or pay in lieu of notice.

31. The 3 month notice period being more generous than the period provided for in section 14(5)(iii) of the Employment Act, cap. 226 (repealed) would prevail.

Appropriate remedies/entitlements

3 months pay in lieu of notice

32. The Claimant is entitled to this head of claim pursuant to the contractual agreement. His testimony that he was earning Kshs 6,409/- at time of dismissal was not contradicted.

33. The Court would award him Kshs 19,227/- under this head.

House allowance

34. The Claimant stated that he was not provided with housing and therefore he was entitled to house allowance for the period he would have served under notice.

35. He quantified this head of claim at Kshs 5,400/- and the calculation not being challenged, the Court finds in his favour.

Christmas bonus

36. The Claimant sought Kshs 6,400/- as Christmas bonus. Again this claim not being challenged, the Court finds for the Claimant.

Gratuity

37. Under the head of gratuity, the Claimant sought Kshs 89,799/-.

38. The Court has concluded that the Respondent had no lawful or justifiable reasons to dismiss the

Claimant. Pursuant to clause 22 of the Collective Bargaining Agreement, the Court would award the Claimant the amount sought, as the calculation was not challenged.

Conclusion and Orders

39. The Court finds and holds that the summary dismissal of the Claimant was unlawful and unjustifiable and was in breach of contract and awards him and orders the Respondent to pay him

i. 3 months pay in lieu of notice	Kshs 19,277/-
ii. House allowance for 3 months	Kshs 5,400/-
iii. Christmas bonus	Kshs 6,400/-
iv. Gratuity	Kshs 89,799/-

TOTAL **Kshs 120,876/-**

40. This matter has stayed inordinately long in the Courts and it would be a suitable case to award interest from time of filing of suit.

41. The Court also awards the Claimant costs of Kshs 25,000/-.

Delivered, dated and signed in Nakuru on this 30th day of October 2015.

Radido Stephen

Judge

Appearances

For Claimant Mr. Karanja instructed by Mirugi Kariuki & Co. advocates

For Respondent Githui & Co. Advocates

Court Assistant Nixon